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OCTOBER TERM, [illegible].

THE STEAMSHIP "BENITO ESTEBAN," Arthur Elliott Beattie, claimant, appellant,

v.

THE UNITED STATES.

No. [illegible].

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA.

BRIEF FOR THE UNITED STATES AND THE CAPTORS.

In the Supreme Court of the United States.

OCTOBER TERM, 1899.

THE STEAMSHIP "BENITO ESTENGER," Arthur Elliott Beattie, claimant, appellant,
v.
THE UNITED STATES.

No. 192.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA.

BRIEF FOR THE UNITED STATES AND THE CAPTORS.

STATEMENT.

The vessel was captured by the U. S. S. *Hornet* on June 27, 1898, off Cape Cruz on the south coast of Cuba, and was brought into the port of Key West and duly libeled on July 2. On July 16, the depositions *in preparatorio* were taken of Baldemero Perez, who stated that he was the master of the vessel; of Edwin Cole, who confirmed this statement of Perez, but can not say

who appointed him, because he was on the ship when Cole himself came on board; yet nevertheless says in answer to the sixth interrogatory, "I was master of the vessel;" of Enrique de Mesa, who also calls Perez master of the vessel, and says that he himself was on board in the capacity of supercargo; and of the purser, José Perez. (Rec., pp. 7–19.) A claim and test affidavit were thereafter filed by the master, Perez, on behalf of the claimant as a British subject residing in England and the true and *bona fide* owner of the vessel; and a test affidavit in the same behalf was also filed by Mesa, who alleged therein that the said steamer had been owned by Gallego, Mesa & Co., a firm doing business in Santiago (where Mr. Mesa also resides), composed of natives and residents of Cuba of which he was a member, and that the steamer was afterwards owned by him and, being so owned, was, on or about the 14th of June, 1898, sold by him to the claimant for the sum of $40,000, for which he executed a proper bill of sale, being at the time indebted to the firm of Beattie & Co., of which the claimant was a member, and receiving credit for a large part of the consideration on the indebtedness (pp. 19–23).

The cause was then heard upon the libel, the depositions *in preparatorio*, and the test affidavits, and by decree filed August 1, 1898, it was ordered that both claimants and captors have sixty days in which to take further proof (p. 24). Accordingly further proof was taken by commission upon interrogatories and cross-interrogatories, and the witnesses so examined were the British collector of customs at Kingston, Jamaica, who was also shipping master and registrar of shipping at

that port (p. 30); the manager and the accountant of the broker at Kingston, who negotiated the alleged sale from Mesa to Beattie (pp. 33-35); the claimant (p. 37), and the brokér in question (p. 44). To the collector's testimony were attached as exhibits the bill of sale which was asserted to have been made (p. 48), and the certificate of the vessel's classification under her British register, to which is appended the claimant's declaration under oath that he is entitled to be registered as owner, and that no person not qualified to be the owner of a British ship is entitled as owner to any interest whatever, either legal or beneficial, in the same (p. 49).

On behalf of the captors the testimony of Louis A. Dent, consul of the United States at Kingston during the Spanish war, was taken by oral examination under agreement between the United States and the claimant (pp. 54–75), and to this testimony was attached (pp. 76–80) copies of certain correspondence passing between Mr. Dent and Rear-Admiral Sampson. Thereafter the cause came on for final hearing, and after argument the court, upon December 7, 1898, entered a decree by which the vessel was condemned and forfeited to the United States as lawful prize as enemy property, notwithstanding the claim filed, and it was ordered that the vessel and cargo should be sold, in accordance with law (p. 24). The claimant then took this appeal, assigning as error (p. 25) the failure to hold that the *Benito Estenger* was a British merchant ship, duly documented and entitled to the protection of the British flag, and was lawfully owned and registered in the name of a British subject domiciled in Great Britain; and that the *Benito Estenger*

was engaged on a voyage on behalf of the local Cuban Junta of Kingston, allies of the United States, and that when captured she was in the service of the United States and, being thus employed in friendly offices to the forces of the United States, was not lawful prize of war.

THE FACTS INVOLVED.

The depositions show that the master was a Spanish subject, born in Spain and living with his family at Manzanillo; that he had been appointed master by Mesa before the ship was sold, and that he was afterwards continued in his post by Mr. Beattie. The crew were Spanish; the vessel was sailing under the English flag, although there was a Spanish flag on board and a Cuban flag as well, the property of Mesa. The documents which she appears to have carried at the time of capture were the English documents, including the British registration, the ship's articles of agreement, the custom-house clearance, bill of health and log book (p. 11), which are now on file in court and show that the *Benito Estenger* cleared regularly from the port of Kingston, Jamaica, on June 23, 1898, as a British vessel. The voyage on which she was captured began at Kingston on the 3d of June, and the vessel thence proceeded with a cargo of rice, flour, corn meal, and coffee, to Manzanillo, where the cargo was discharged. She cleared from Manzanillo at 2 o'clock a. m. on June 27, and was captured about 5 a. m. on the same day off Cape Cruz. The return voyage was to have ended at Montego Bay, a port on the north shore of Jamaica. There was no cargo on board at the time of capture, and the only passengers were a

servant of Mr. Mesa and a former captain of the vessel, a Spaniard, who was taken on board at Manzanillo and was proceeding to Kingston and thence to Europe (pp. 7-12). Mesa says (p. 13) that he himself was on the vessel when she was seized, in the capacity of supercargo, and was in charge of the vessel by the request of the owner, and it seems from his reply to the seventh interrogatory that it was proposed to take another cargo from Montego Bay to Manzanillo, because he says that this voyage was to have ended at Montego, and then adds: "We were to load at Montego Bay and go back to Manzanillo." Mr. Mesa's own account of the transfer to the claimant is that Mr. Beattie bought the vessel from the firm, Gallego, Mesa & Co., of which the witness is a member; that there was a public bill of sale made in the presence of witnesses on the 1st day of June, 1898, at Kingston, and that there was no other engagement than that appearing on the bill, and that the claimant had been in possession since June 1. He says that the sale was made for the reason that the situation was so grave that his family were compelled to sell in order to get money to live on; that the price was $40,000, which sum has already been paid. It appears that there was no charter party for the voyage; that the vessel was not insured, and that all the documents, including the bills of lading taken on at Kingston, were delivered to the prize master (pp. 14, 15). The purser knows that Mr. Beattie was the owner, because when he came on board he was introduced as the owner and gave orders. The purser says that the transfer to Beattie was made between the 10th and 14th of June at Kingston; that he does not know what sum of

money was paid, but he, like the other witnesses, believes it was a legal sale, and that if the ship were restored she would belong to the person asserted to be the owner, and to no one else; and he says that Mr. Mesa told him that he had sold the ship for the support of his family.

In the test affidavits the master, Perez, states that, although born in Spain and living in Manzanillo, he was a sympathizer with the cause of the Cuban insurgents; that the *Benito Estenger* left Manzanillo for Kingston about the 4th or 5th of June, Mr. Mesa, the owner, being on board, and she arrived at Kingston about the 7th of June, and while there was sold by Mr. Mesa to Mr. Beattie, which he knows because Mr. Beattie came on board and informed him that he could remain as master, but it would be necessary for him to put an English subject on board as first officer or second captain, in conformity with British law—this refers to the witness Cole—that the vessel left Kingston on June 23 for Manzanillo with a cargo of provisions consigned to the order of Beattie & Co., with Mr. Mesa as supercargo; that on the voyage from Manzanillo Mr. Mesa informed him that he would communicate with Admiral Sampson at Santiago if possible, and after the seizure he heard Mr. Mesa request the officer of the *Hornet* to take the steamer to Admiral Sampson.

Mr. Mesa himself found it necessary or desirable to file his own test affidavit on the claimant's behalf, from which it appears that the *Benito Estenger* was first owned by his firm and then by himself, although he does not say when it passed from the possession of the firm to his individual possession; that up to about April 4, 1898,

she had been running coastwise between Cuban ports under the Spanish flag; that he was a prominent adherent of the Cuban cause and many of his relatives were connected with the insurgents, and having lost much of his property during the war, and fearing that the vessel might be seized by the Spanish Government, on June 2 he took her over to Jamaica from Cuba with the intention of disposing of her at once, and placed her in the hands of Mr. Orrett, an attorney and broker of Kingston, informing him that he thought the vessel could be sold to Beattie & Co., who, as he had learned before leaving Cuba, needed a larger vessel than the one already owned by them for bringing supplies from Jamaica to Cuba for the families living on their sugar estates near Manzanillo (p. 20); that accordingly, on or about June 14, Mr. Orrett negotiated a sale of the vessel to Arthur E. Beattie, of the firm of Beattie & Co., for the sum of $40,000, for which, or a large portion of which, credit was given on indebtedness of Mesa to the firm of Beattie & Co.; that after the sale the vessel was put on the route between Jamaica and Manzanillo for both the freight and passenger trade until arrangements could be made to run her regularly in their plantation trade to Jamaica; and that he, Mesa, was employed by Mr. Beattie to go on the vessel as his representative and business manager. The affidavit then alleges that the American consul at Kingston, having learned in some way that Mr. Mesa contemplated the building of docks in the harbor of Santiago, and with that view had procured extensive drawings of the harbor, sought an interview with Mr. Mesa, to which the latter took Mr. Beattie as a Cuban

sympathizer, and that after conversation on the subject of the plans and soundings of the harbor of Santiago Mesa made and submitted plans and marked out a place suitable for the landing of the American forces in the battle of Santiago, and that thereupon it was agreed between Mesa and the consul (who was informed by Mr. Beattie that the *Benito Estenger* would sail shortly for Manzanillo and return thence to Jamaica), that on her return Mesa should go up to Santiago and meet Admiral Sampson, and that on the return trip accordingly (for which about sixty refugees had been booked for Jamaica, who shortly before the vessel departed had been prohibited from leaving by the Spanish Government), it was understood by all the officers on board, who were also Cuban sympathizers, that the vessel would wait for Admiral Sampson's fleet for the interview referred to in conformity with the agreement with the American consul. Deponent, therefore, upon capture requested to be taken to the admiral, but this was refused by the boarding officer; upon which facts Mr. Mesa claims that at the time of the seizure the steamer was to all intents and purposes in the service of the United States Government.

The further proof showed, by the customs and shipping official at Jamaica, that Mr. Beattie applied for a British register and lodged with the officer the bill of sale in conformity with British law, and made a declaration of ownership before him as registrar of shipping, which documents were filed on the 9th and 14th of June, 1898, respectively, and are in conformity with the requirements of British law (pp. 30, 33). It was shown by the manager and the accountant of the broker who

conducted the sale of the vessel that early in June, 1898, while the *Benito Estenger* was lying in the harbor at Kingston, Mr. Mesa informed the broker that he desired to sell his vessel, and returned some days later to the witness's office with Mr. Beattie, and stated that he had sold the steamer to Mr. Beattie for £9,000, the sale being consummated on the 9th of June; that some years before the *Benito Estenger* had been engaged in trade between Santiago, Haiti, and Jamaica, and when withdrawn from that trade was stated to be engaged in coast trade between Cuban ports; that Mr. Mesa himself agreed with Mr. Beattie for the sale of the vessel, and the broker did not finally represent either party to the transaction; and Mr. Mesa having concluded the sale himself, the witnesses, therefore, while they state that the agreed price was £9,000, and believe that the sale was *bona fide*, are unable to say what arrangements were made for the payment of the price or how and in what shape the purchase money was paid. The accountant stated that after the sale Mr. Beattie went on board and took possession of the vessel and informed the officers in charge that he had become the owner, and gave orders regarding her, and informed the witnesses that he had given Mr. Mesa the position of supercargo (pp. 33–37).

By Mr. Beattie, the claimant, it was shown that he was a member of the firm of Beattie & Co., composed of himself and his brothers, all of them British subjects, the sons of a former British consul at Santiago, and that he and his brothers are jointly interested in possessions in Cuba, consisting of lands, sugar estates, mines, and forests in the district of Manzanillo, and that his own

occupation was the attending to the business of the sugar estate; that he had resided at Manzanillo for some years, returning to his parents' home in England on different occasions for several months at a time; that he had concluded the purchase of the *Benito Estenger* from Enrique de Mesa on June 9, 1898; that she left Jamaica on her last voyage on June 23, bound for Manzanillo and chartered by Flouriache, a Cuban merchant, carrying a cargo of food stuffs, sent for the purpose of trade; that the intended voyage was communicated to the United States consul before the departure of the vessel from Jamaica; that he had discussed the question with the consul, who led him to believe that such a voyage would be in order; that previous to the sailing, Mesa and witness had an interview with the United States consul, when Mesa gave the consul the plans of the harbor of Santiago and of the province, whereupon the consul proposed that Mesa with the ship should meet Admiral Sampson after the discharge of the cargo, and should be off Cape Cruz on June 30, for the purpose of meeting a vessel of the United States to convoy the *Benito Estenger* to the Admiral's fleet then blockading Santiago, to which the claimant as owner consented, impressing upon Mesa the importance of keeping the appointment, and upon the consul the necessity resting upon the latter of prohibiting him (Beattie) as owner of the vessel against a breach of neutrality laws; that he had gone to the interview solely to act as interpreter for Mesa, and at his request; that the consul assured him that his interests as owner of the *Benito Estenger* would be protected; and that because of the capture on June 27 there was no op-

portunity of keeping the appointment made with Mesa and the witness for the 30th; that the vessel had been engaged in no transactions unfriendly to the United States, and had held no communication in any way with the Spanish authorities, either in Cuba or Jamaica, relative to the cargo or the voyage; and that the witness would not have permitted the vessel to sail from Kingston for Manzanillo unless he had been assured of the protection of the United States. In response to cross-interrogatories, claimant stated that he had gone to Jamaica with Cuban refugees on June 2, not wishing to share the fate of many pacificos, and that the business in connection with his Cuban estate is transacted in Jamaica; that the *Benito Estenger* had previously been engaged in the passenger trade between Guantanamo and Santiago, sailing under the Spanish flag. Referring again to the sale, he said that he learned that Mr. Mesa wished to sell the vessel; and he subsequently offered her to him; that he bought her for £9,000, and that a formal bill of sale was then executed and he was put in possession; but he declines to say of what the payment or payments of the purchase money consisted, although stating that the sale was *bona fide*. Since the commencement of the Spanish war he had been engaged in endeavoring to keep his business together; had never bought or sold any supplies from or to the Spanish Government or to anyone in its behalf, and had transacted no business in Cuba since the beginning of the war, with the exception of carrying refugees on another steamer, owned by him, from Manzanillo to Montego Bay on June 2, and would have left earlier than that date if he had been permitted to do so

by the Spanish authorities; that the officers of the *Benito Estenger*, after he became the owner, were: Captain, Edward Cole, a British subject, appointed by himself, and the former officers, whom he continued in their posts, the former captain, however, Perez, going as second mate and pilot, and Mesa, whom he had appointed supercargo (pp. 37–44).

The ship broker stated that he was an old correspondent of Mesa's firm (Gallego, Mesa & Co., of Santiago); that Mr. Mesa is a Cuban, sympathizing warmly with the Cuban cause, and has always been in favor of the annexation of Cuba to the United States. This witness inferred—because of his experience as a ship broker of the difficulty of transferring a vessel to the British flag and obtaining a British register, as illustrated by the refusal of registry to another vessel by the registrar of shipping about this time—that since the transfer of the flag was effected in the case of the *Benito Estenger*, the sale must have been a *bona fide* one, Mr. Goldie, the collector of customs and registrar of shipping, being a scrupulous and careful official. This witness also states that the vessel on the voyage in question from Kingston was chartered to one Solis, who, he thinks, was a Cuban, and Mr. Mesa, as supercargo, informed him that the cargo was intended for the Cubans. The broker also states that Cole was appointed master upon his recommendation to Mr. Beattie; that he, witness, had been impressed in all his conversation with Mesa and Beattie that they were ardent supporters of the Cuban cause and would spurn to do anything inimical to the interests of

the United States, and that the Spanish authorities had been inimical to the firm of Beattie & Co. in Cuba (pp. 44–47).

The United States consul at Kingston, Mr. Louis A. Dent, testified that in conversation with the claimant a few days after the *Benito Estenger* left Jamaica, he suggested that the change of flag of the vessel was fraudulent, and that Mr. Beattie, by having sworn to the declaration of ownership, rendered himself liable to prosecution under the British merchant shipping act, which Mr. Beattie did not deny, but replied that he had signed the declaration to oblige Mr. Mesa, who was an old friend. Subsequent to the seizure the consul had another conversation with Mr. Beattie, in which he asked him the direct question, whether the charge that the transfer was fraudulent was not correct; that Mr. Beattie was much disturbed and said that he realized the position in which he had placed himself, and regretted it very much; that he should never have been asked to sign the declaration; that he had not paid anything for the vessel, but that his claim was that the vessel was really his, having been given to him absolutely by Mr. Mesa, upon which the consul suggested that the gift was to be returned after the war was over and was made for the purpose of effecting a transfer and protecting the vessel, which Mr. Beattie admitted to be true. Consul Dent also testified that near the time of the alleged transfer, but subsequent thereto, he had two conversations with Mr. Mesa, the first of which, however, may possibly have been a day or two before the transfer, in which Mr. Mesa, accompanied by Mr. Beattie,

called upon him and requested a pass for the vessel which would enable him to enter a Cuban harbor; that he refused to give this, stating that it was not within his power to give him a letter which would be in the nature of a permit or pass through the blockading vessels; that the conversation turning on the character of the country in the neighborhood of Santiago, and Mr. Mesa stating that he had an old Government plan of the province and a specially prepared chart of the harbor of Santiago, at the consul's request he gave both of these to the latter; that he advised Mesa that Manzanillo was blockaded in fact, and that he would not be able to enter there, and that as Mr. Mesa claimed to have a special and intimate knowledge regarding the topography and character of the country surrounding Santiago, the consul had said to him that if Mesa would be at a certain point at a certain time, the Admiral, if he cared to avail of information from Mesa, might possibly send a vessel to take him to the fleet and there question him, and that after further conversation Mesa agreed to be at a point 20 miles due west of Cape Cruz on the morning of June 30.

In the next conversation between Mesa, Beattie, and the consul, which occurred a few days subsequently, Mesa spoke of his plans for the voyage in reference to meeting the Admiral, and again endeavored to extract a letter of protection from the consul, which was declined, the latter informing Mesa again that Manzanillo was blockaded, and that he would go there at his own risk, and Mr. Mesa left the consul with the understanding that he was not traveling under protection from him (pp. 54–57). Accordingly, on June 23, the date on

which the *Benito Estenger* left Kingston, the consul wrote a letter to Admiral Sampson (p. 77), in which he enclosed Mesa's plans and states that he knows nothing of Mesa personally; that he is a member of a large firm at Santiago, a man of property, and probably one of no special prejudices. He also states that Mesa offered his plans voluntarily with any information which he might be able to give relative to the country around Santiago, without compromising himself, and expected nothing in return but the prospect of peace and the resumption of his business. The consul then states the proposal for a meeting with the Admiral, naming a point 20 miles off Cape Cruz, due west, where a cruiser could pick the vessel up, ostensibly for examination, but really for an interview if the Admiral desired it, and he named the date for the appointment, Thursday morning, June 30, and suggested that if the Admiral cared to avail of the plan, he could send a vessel to the point named. He distinctly declines to recommend Mesa to the Admiral, and suggests that in dealing with a man in Mesa's position imposition is always possible. He then refers to the statement of the president of the local Cuban Junta at Kingston, which he rather believes to be the fact, because the president of the Junta had said that to avoid seizure of the provisions by the Spaniards they were to be sold before being landed from the ship. Notwithstanding this latter impression, stated in his letter, the consul, however, testified (p. 58) that the claimant and his brother informed him, evidently after the statements made to him by the president of the Cuban Junta, that the cargo was landed in the warehouse of

merchants at Manzanillo adjoining the Spanish Government warehouse, to which it was subsequently transferred, the claimant's brother stating that he personally saw the flour thus transferred. The consul also testified (p. 60) that the statement in Mesa's test affidavit that he went to Jamaica with the intention of disposing of the vessel to Beattie & Co., is untrue, because in the first conversation with Mesa, referred to above, Mesa had said that he left Cuba with the vessel with the intention of taking her down to the eastern islands of the Caribbean Sea for the purpose of doing business with her or of disposing of her.

The consul repeats, on cross-examination (p. 68), his statement that he had warned Beattie and Mesa that there was a blockade in fact at Manzanillo, and says that Mesa left Jamaica two or three days earlier than he understood the vessel would leave, and omitted an intended call at Montego Bay for more cargo, which surprised him, because if Mr. Mesa had followed the plan which he had announced he would not have been at the point of capture three days previous to the date of the appointment, viz, on June 27; and the fact that he did not carry out his plan fixed in the consul's mind the impression that Mesa had no intention of being at the point specified. On the suggestion being made to him by the claimant's counsel that after the arrangement made it was not a proceeding in good faith to effect the capture, the consul reasserted strongly his refusal to give Mesa a permit or letter to the Admiral; that his own letter to the Admiral was in order to test Mesa's good faith, so that if he, Mesa, concluded to make the trip, he could

have the opportunity to present his case to the Admiral and let the Admiral decide his right to make the voyage; that the entire plan was at Mesa's own risk and venture, and that the latter did not keep good faith, because he did not keep the appointment, but went into Manzanillo and was captured three days before the time set for the appointment (p. 69). The consul's entire thought in the matter was that Mesa should seek the meeting with the Admiral before endeavoring to enter any Cuban port, in order to ascertain just what the Admiral would permit him to do (p. 71). Upon further examination, the consul reiterates his statement that there was never at any time any semblance of an agreement between Mesa and himself, or any effort on his part to persuade Mesa to any particular course, Mesa laying his own plans and following his own judgment and wishes. The suggestion to Mesa was not that he should follow a certain course with his vessel, but, on the assumption that she would depart on the proposed trip in any event, that Mesa should, in the execution of his own plans, be at the point suggested at the time specified (pp. 73, 74). The consul, however, (id.) shows that he considered it possible that Mesa, in the pursuance of his own intention, might get into Manzanillo and succeed in landing his cargo and be off Cape Cruz on June 30 upon his return trip. He also repeats that it was Mr. Mesa's desire, and not his own, that Mesa should meet Admiral Sampson, and the letter to the Admiral was written at Mesa's solicitation and suggestion. The letter of Admiral Sampson to Consul Dent (p. 76) and the

other letters of the consul to the Admiral (pp. 79–80) contain nothing more of special significance in the case, although the Admiral's letter shows that he was making every effort to stop generally the blockade-running on the south coast of Cuba, and both his letter and the consul's letters refer to the case of the *Adula* particularly. The consul's letters of June 21 and 22 show that he had made efforts to prevent the departure of the *Benito Estenger;* that he knew that the *Benito Estenger* was about to sail, and that he had endeavored to prevent her departure and the departure of other vessels engaged in similar trade, namely, the carrying of provisions for a Spanish destination.

As the claim rests largely in assertion, the foregoing full abstract of the testimony seems desirable.

ARGUMENT.

The main question involved here is as to the ownership of the vessel and the legality of the alleged transfer. The collateral questions relate to the Cuban sympathies of Mesa, who, the United States maintains, was still the owner at the time of capture, and to the assertion of service on behalf of the Cuban insurgents or the United States which Mesa and the claimant set up. Connected with the latter questions is the relation of the United States consul to the transactions which preceded the seizure of the vessel. It will be more convenient to dispose of the latter questions first, always keeping in view the principle that in a case of libel as prize of war the burden of proving the ownership of ship and cargo is

upon the claimants (*The Jenny*, 5 Wall., 183); and that on the production of further proof, if the neutrality of the property is not established beyond reasonable doubt, condemnation follows. (*The Amiable Isabella*, 6 Wheat., 1.)

I.

The Spanish nationality and alleged Cuban sympathies of Mesa, the supercargo; the trade presented by the case as illicit intercourse with the enemy; the facts about Manzanillo as a Spanish stronghold.

The very fact that it seemed important to the claimant to seek to show by the testimony of different witnesses that Mr. Mesa was really an adherent of the Cuban cause is an unconscious admission that his interest in the vessel was not entirely ended; but the fact is that he was a Spanish subject, engaged in business as member of a well-known firm at Santiago, and a man of means, who must necessarily have enjoyed a full measure of protection from the Spanish Government of the island and have been on terms of cordial and loyal adherence to their régime. At least, there is no evidence, except vague opinion and surmise, that he was either openly or secretly attached to the native Cuban cause. The allegation of sympathy with that cause is also made regarding the officers and crew of the vessel. This might be the case as to people in their walk of life, although engaged in a commercial service tributary to the Spanish operations, but it would not be especially significant, and there is really nothing in the record to support this contention on their behalf either. It is a well-known fact, consonant with

average human nature, that after the event of such a war there are many people in the same situation as the Vicar of Bray, who are quite ready to change their allegiance to the winning side, and are fully convinced that they were on that side from the beginning. No doubt, beside such people who were really loyal, but who now are willing to say that they were not, there were many thousand people in Cuba whose loyalty was only a profession and who were lukewarm to either side. Nevertheless, they all were Spanish subjects, and under the decisions of the court upon allied questions and in similar situations would properly be regarded as subjects of the enemy. There are numerous authorities for this rule in the decisions of the court. Political status, and not individual loyalty or disloyalty, is controlling on the question of enemy ownership. In war the belligerents and all their citizens and subjects are enemies to each other. In war all residents of the enemy's country are enemies. (*Jecker* v. *Montgomery*, 18 How., 110; *Lamar* v. *Browne*, 92 U. S., 187; *The Venus*, 2 Wall., 258; Prize Cases, 2 Bl., 635; *Mrs. Alexander's Cotton*, 2 Wall., 404; *Young* v. *United States*, 97 U. S., 39; *Ford* v. *Surget*, 97 U. S., 594; *The Amy Warwick*, 2 Sprague, 143; *The Hiawatha*, Blatchf. Prize Cases, 1.) And this is so without regard to the personal sentiments or dispositions of such residents (*The Peterhoff*, 5 Wall., 28), and applies even to citizens of a neutral country established in business in the enemy's country. Such must be regarded as enemies and their property as enemy property. (*The Flying Scud*, 6 Wall., 263.) We shall have occasion to refer again to the last rule.

It may well be that a person who was a professed and known insurgent, or openly belonged to that party, which was the patriotic cause and the one in alliance with us, would be relieved in a similar case from the penalty of prize law, but such a person would not have been engaged in the business which resulted in this seizure, and there would be no equivocal aspect in his relations. The most that can be said for Mr. Mesa is that his relation was doubtful and half-hearted, and nothing short of proof that he was a Cuban rebel to Spain and not merely a Cuban subject of Spain would suffice to aid him.

As to the business on which the vessel and he as supercargo were engaged, it was merely one of many ventures by which provisions were carried to the Spanish city of Manzanillo, or to the adjacent city of Cienfuegos, for the relief of the Spanish forces and population.

There is another reason why the plea of Cuban adherence would not aid Mr. Mesa. It has been determined that trading with the enemy, except by license, subjects the property to confiscation; that this rules applies to *allies;* that the interposition of a prior neutral port makes no difference as to the illegality of such trade. (*The Rugen*, 1 Wheat., 62; *Jecker* v. *Montgomery*, 18 How., 110.)

It is not necessary to dwell much on the suggestion that the cargo of provisions was dispatched at the instigation of the Cuban Junta in Kingston, and therefore that it must have been intended to elude the Spanish authorities and reach the Cuban forces, or the distressed Cuban population, mostly women and children, on Mr. Beattie's plantation or other plantations in that locality,

whose husbands and fathers were in the Cuban army. That is at most a mere suggestion, and if true was capable of being proved, and was not especially relevant, for, without imputing any double-dealing to officers of the Cuban Junta, it is too far to seek to speculate here inferentially upon the suggestion as to what purposes they had in mind, or what plans or schemes they might have been furthering. The undoubted evidence is that a cargo of provisions was dispatched, after warning that the United States naval forces were on blockading duty off the south coast of Cuba, that Manzanillo itself was in a state of blockade in fact, and that the vessel would not be allowed to pass. This sort of trade was carried on in many instances during the Spanish war, especially from Jamaica, and was a trade which the United States, for obvious reasons, sought to prevent and terminate by the efforts of our consular officers and the activity of the vessels of our fleet on their blockading stations. The trade was directed to ports like Manzanillo and Cienfuegos, well known to be in the absolute and secure control of the Spaniards, where they had garrisons and fortifications and where the distribution of food for the use of the forces of the enemy naturally and evidently took place. Apart from the direct evidence in the record as to the destination of the food supplies carried by the *Benito Estenger*, there is a fair,—indeed, a necessary presumption, that the Spanish authorities, in the conditions notoriously prevailing at that time in Cuba, and with the constant diminution of food supplies, would seek to obtain provisions, and

would control and use, on the ground of military necessity for the Government needs, all supplies arriving. Therefore, to take provisions to a city like Manzanillo was well known to be a highly profitable business. There may have been no technical breach of blockade in this case, and provisions may not generally be looked upon as contraband of war, but the trade, by whomsoever carried on, to such a port, was with the stronghold of the enemy, fortified and garrisoned and practically beleaguered and besieged. It was trade which the United States in the exercise of belligerent rights was entitled to destroy, being, in view of the laws of war, illegal and contraband trade, in the sense of illicit intercourse with the enemy; and, at any rate, was prohibited by the intention and effect of the belligerent operations of the United States. It was professedly a trade of danger and hazard, else why did Mr. Mesa wish a pass and, failing to obtain that, seek to have an interview with the Admiral in order to obtain his protection? Here was no innocent neutral trader carrying an ordinary commercial venture to an open port of the enemy for sale through the ordinary channels of trade, but a Spanish subject conducting as supercargo a vessel which a few days before had been his own Spanish vessel (to lay aside for a moment the question of the validity of the transfer), manned by Spanish subjects and carrying on board, although not flying, the Spanish flag, and sailing with provisions to a strongly fortified town, notoriously in Spanish control, after warning that a permit would not be given, that the trade would not be permitted by the

American commanders who might be met, and that Manzanillo was in a state of blockade in fact. Moreover, the testimony of Mr. Beattie (p. 39) is that the vessel was chartered by Flouriache, a Cuban merchant, although Mesa and the master say (pp. 8, 14) that no charter party for the voyage was signed, while the broker Orrett testifies (p. 46) that the vessel was chartered by one Solis, who, he thinks, was a Cuban. Mr. Solis has appeared in the record in the *Aduda* case as the supercargo on that vessel; and Justice Story is authority for the propriety of referring in one prize case to the record in another prize case (Notes on Princ. and Prac. Prize Cts., pp. 26, 54). Further, Mesa stated in his test affidavit (p. 23) that the provisions were consigned to a firm of merchants at Manzanillo, and the captain that they were consigned to Beattie & Co. (p. 20), but Consul Dent states positively that both the claimant and his brother informed him that the merchants' warehouse adjoined the Spanish Government warehouse, and that the cargo was transferred by the merchants to the Government warehouse immediately upon its delivery, the claimant's brother having personally seen the transfer.

Now, it has been decided by the court in the case of *The Commerce* (1 Wheat., 382) that provisions destined for military use are deemed contraband of war, Justice Story saying:

> By the modern law of nations provisions are not, in general, deemed contraband; but they may become so, although the property of a neutral, on account of the particular situation of the war, or on account of their destination. * * * If destined for the ordinary use of life in the enemy's country they are

> not in general contraband; but it is otherwise if destined for military use. Hence, if destined for the army or navy of the enemy, or for his ports of naval or military equipment, they are deemed contraband.

Here we claim that neither the vessel nor the cargo belongs to a neutral, and that the property seized was enemy property; but the illegal nature of the trade and the hazard of Mesa's venture, which he showed that he well understood, fully appear, because even provisions are to be deemed contraband of war when destined for military use, although belonging to a neutral.

In *The Peterhoff* (5 Wall., 28) Mr. Chief Justice Chase, on pages 58, 59, shows the classification into which contraband may be divided, one of which is articles which may be or are used for purposes of war or peace, according to circumstances, and another of articles exclusively used for peaceful purposes; and his statement is that merchandise of the one class is contraband only when actually destined to the military or naval use of the belligerents, while that of the other is not contraband at all, though liable to seizure or condemnation for violation of blockade or siege. As to ulterior destination of merchandise, contraband or not contraband, respectively, he remarks:

> The latter is liable to capture only when a violation of blockade is intended; the former when destined to the hostile country, or to the actual military or naval use of the enemy, whether blockaded or not.

(See also Parsons Marit. Law, vol. 2, pp. 93, 94; 1 Kent Com., 140; *The Peterhoff*, Blatchf., *Pr. Cas.*, 463,

and auth. cit.; *The Jonge Margaretha*, 1 Rob., 189; *The Edward*, 4 Rob., 68; *The Frau Margaretha*, 6 Rob., 92; *The Ranger*, 6 Rob., 125; *The Zelden Rust*, 6 Rob., 93.) In the last-named case a cargo of cheese, with a nominal destination from Amsterdam to Corunna, was condemned as contraband on the ground that the vessel was actually or probably destined for Ferrol, which was on the other side of the bay and was a port of naval equipment; Corunna also being a port of naval equipment, though not to the same extent as Ferrol.

Food for the support of an army is undoubtedly used for purposes of war, although under other circumstances the use would be for peaceful purposes, and therefore the cargo of this vessel, if the vessel had been seized before the cargo was discharged, would have been valid prize, whether Manzanillo were blockaded or not. And the cargo would have been valid prize also, under the circumstances (as the vessel actually was), on the ground of trade with the enemy—as a species of that illicit intercourse which Chief Justice Chase in the *Peterhoff* case calls "unneutral participation in the war." But while condemnation of the vessel is not sought on the ground of blockade-running or merely because of the taint of a contraband cargo which had been discharged, these aspects of the transactions are pointed out to emphasize the illegal and hazardous nature of the vessel's venture, of which, as the record fully shows, all the persons interested in her were fully aware, notwithstanding their professions of innocence or of disinterested service to the Cubans and the United States. If not, we ask again why did Mr. Mesa wish a pass or permit? Why did he

wish to see the Admiral? Does he expect the court to believe that his only object was to reveal, for the benefit of the United States and to the disadvantage of his sovereign, facts of more or less importance about the harbor of Santiago, the topography of the surrounding country, and available landings for troops? It may be that he does not object to disclose himself as trafficking or willing to traffic with all the parties to the contest; but that will hardly convince the court.

There is no evidence in the record of the condition of affairs at Manzanillo in relation either to its being under a state of actual blockade, as Mr. Dent says that he had been informed, and of which he had warned Mesa and Beattie, or in reference to its condition as an important point fully under Spanish control and the seat of offensive and defensive military operations. It is the first important place on the south Cuban coast on the stretch between Santiago and Cienfuegos, and lies inside the bay or bight formed by the promontory which Cape Cruz terminates, and about 60 miles northeast of the cape. Cape Cruz is almost due north from Montego Bay on the northwestern shore of Jamaica, and about 75 miles distant, while Kingston is on the southeastern Jamaican coast. But official reports show fully the state of the case in these respects at Manzanillo.

A letter from the Secretary of the Navy to the commander in chief of the United States forces on the North Atlantic Station informed the latter of the Department's desire that he should maintain a strict blockade of Cuba, particularly the ports of Habana, Matanzas, and, if possible, of Santiago de Cuba, Manzanillo, and Cienfuegos

because such a blockade might cause the Spaniards to yield before the rainy season was over. (Appendix to Report of Bureau of Navigation, p. 171.) The letter of Admiral Sampson in this record (p. 76) shows that he was endeavoring to stop blockade running on the south coast of Cuba, and that there was a large vessel with a heavy battery at Cape Cruz; this must necessarily have been chiefly for the purpose of preventing access to Manzanillo. Mr. Dent thinks that his conviction that there was a blockade in fact at Manzanillo came from information which he received from the Admiral through letters and through verbal messages by means of press dispatch boats which were frequenting Jamaica daily (p. 72); so that there was valid ground for Mr. Dent's warning to Mesa of a condition of blockade at Manzanillo, although an effective blockade at that precise point may not have been instituted and maintained until after the proclamation of June 27, by which the entire south coast of Cuba from Cape Cruz to Cape Frances was proclaimed to be under blockade.

In the Appendix to the Report of Bureau of Navigation at pages 227–235, 243, 244, 254, 261–266, 298–309, will be found reports of attacks by our naval forces at or near Manzanillo, which, it is true, began about the time of the seizure of this vessel rather than before, but which show what the situation was, as to past time as well, at Manzanillo as a Spanish stronghold and a rendezvous of the Spanish forces. It is clear that there were Spanish gunboats in the harbor and among the cays, and that there were blockhouses and extensive fortifications of the army on shore. Points of land in the vicinity were

found to be "alive with soldiers." In addition to numerous gunboats of the enemy there were torpedo boats, which vessels were all armed with machine guns and 3 and 6 pounders, and were supported by heavy artillery on shore and to the rear by a battery of field artillery. One of the Manzanillo cays had a concealed gun. In the report of the first conflict between the forces of the United States and Spain, which occurred on June 30, 1898, the Spanish vessels sustained the attack of our vessels in a spirited and effective manner, and the recommendation of the officer commanding one of the vessels of the United States is that in order to put an efficient stop to the inside traffic among the waters and cays thereabouts "this stronghold of Manzanillo should be destroyed, and it would take a much larger force than I have at my command to accomplish it." (Report, etc., p. 229.)

It is not necessary to dwell in detail upon the various reports cited, but it is evident throughout them that Manzanillo was a large city; that it was defended by numerous vessels of war, one of them being a gunboat of about 1,000 tons, and by shore batteries. It is repeatedly called a "stronghold" by our officers. It was the terminus of a cable which connected with Santa Cruz del Sur, Trinidad, Cienfuegos, and Habana, which was cut by our forces in order to check the "inland traffic with Manzanillo" (p. 244) and to prevent the calling of reenforcements "now in the west to resist our outward attack and capture of Manzanillo." The Report, on page 254, says that a captain of a British schooner, which was boarded and allowed to proceed, reported the people of

Manzanillo in a deplorable condition, "all the food obtainable being appropriated by the 4,000 troops there." On July 18 there was a second engagement, the object of which was to destroy the enemy's shipping, but not to engage the field and shore batteries or forts; and still later there was a bombardment of Manzanillo, as to which, the demand of the United States commander for surrender having been refused, the statement is made (p. 302) that the town, being fortified, is exempt from the privileges and immunities attached to defenseless places. At that time it appears that there were nearly 5,000 armed Spanish troops in the city (p. 299), and there is no reason whatever to doubt that there had been a force very nearly as large for a period long prior to the seizure of the *Benito Estenger*.

It fully appears from the foregoing that Manzanillo, like Santiago and Cienfuegos, was one of the most important of the Spanish strongholds, and was the headquarters of a large military and naval force. Even if Mr. Beattie and Mr. Mesa were endeavoring to take food supplies to such a place for the relief of the distressed and starving population, they were not well advised in running the risk of seizure and delay in payment, if not confiscation, because of military necessity; and again, if their real purpose and the ultimate destination of the supplies were as alleged, they certainly have not offered clear and satisfactory proof to that effect, evidence drawn from their own statements showing the contrary.

We therefore contend that the facts here show that Mesa was an enemy subject, carrying on a forbidden trade

with the enemy, and not an ordinary commercial trade, but trade with the forces and authorities of the enemy, by which they were enabled to continue and prolong the war. In *The Belle* (Blatchf. Pr. Cas., 294) it was laid down that previous notorious enemy ownership and illicit trade are sufficient to condemn the vessel where *bona fide* purchase and voyage are not shown. Property captured trading with the enemy is deemed quasi-enemy property. (*The Joseph*, 1 Gall., 545; *The Rapid*, 1 Gall., 295.) There are many other authorities for this doctrine. (Dig. Fed. Cas., pp. 2383, 2391.)

II.

The asserted agreement with the United States consul and the alleged service to the United States and the Cuban insurgents.

It will be seen from the naval reports which have been cited that Manzanillo was the point to which many vessels, some of them neutral and others, besides the *Benito Estenger*, whose nationality and status were doubtful, resorted with their cargoes, and that the United States, through its naval commanders and its consular officers, was endeavoring to prevent and check this traffic. This record also refers to other vessels engaged in such trade, or similar doubtful ventures without cargo, some of them steamers, others schooners, and of different nationalities (pp. 62, 76, 79, 80). The United States consul very properly watched and reported this traffic, and endeavored, through diplomatic channels, to prevent it. The remarkable claim is set up that he went so far in

this course of proceeding and took such steps in regard to it relative to the *Benito Estenger* that he committed the United States to the protection of the vessel, on the theory that under an engagement with him she was really in the service of the United States. The simple facts of the case are as follows:

Mr. Mesa wished to obtain a permit or pass from Mr. Dent, which Mr. Dent had no right to give and which he declined to give. At Mr. Mesa's own solicitation or suggestion, Mr. Dent agreed to write the Admiral, and did write, stating that Mesa offered certain information which the Admiral might deem valuable and of which he might desire to avail; that he, Mesa, proposed to be off Cape Cruz on June 30, and could be picked up there by a United States vessel and taken to the Admiral for an interview if the Admiral so wished. It was distinctly understood that Dent gave no countenance to Mesa's plans for this voyage, but on the contrary warned him not to make it; that he did not bind either the United States or the Admiral in any way or to any degree, and that the whole proceeding was at Mesa's risk. The only understanding—so far as there was any understanding or agreement—was that Dent would advise the Admiral (which he did) that Mesa proposed to be off Cape Cruz on June 30. Mesa (p. 22) says that "it was agreed between the consul and deponent * * * that deponent would go up to Santiago and meet Admiral Sampson, and the consul would in the meantime advise Admiral Sampson, *if possible*."

Here is Mr. Dent's own story of the occurrences—to the question whether he had not as a matter of good

faith written to the Admiral, and, having received the plans and surveys of Santiago, made the suggestion that there should be an appointment to confer with the Admiral, by which is indicated the theory of the claimant that the vessel was unjustly entrapped by a breach of good faith, Mr. Dent says (p. 69):

> My answer is this: Mr. Mesa came to me and asked me to give him some protection. I refused to give him a permit, as already stated, and it was suggested that I give him a letter. I refused to give him a letter to the Admiral, as I did not have strong faith in the good faith of Mr. Mesa, and in order to test Mr. Mesa I agreed to this plan; that I said to him that if he wanted to go over there and make this trip, I would put it in his way to present his case to the Admiral personally, and then let the Admiral decide whether he could make the voyage, and that in order to do that I would write this letter direct to the Admiral which I would not give to him, and he could make the voyage at his own risk and venture and take the Admiral's decision if he saw fit. Mr. Mesa did not keep good faith, because he did not keep the appointment; went into Manzanillo, and was captured three days before the time set for the appointment. I state to you very frankly that my dealing with Mr. Mesa, in my official capacity, was naturally reserved and cautious, and that the plan already agreed upon was, as stated on my part, one which would test his good faith. * * * I claim that the entire transaction was a breach of faith on Mr. Mesa's part. As before stated, I told him that it would not be advisable for him to carry a cargo, because, in my judgment, the Admiral would in no event permit a cargo of that character to be landed in Cuba. Mr. Mesa's movements were left entirely

to himself, at his own risk, and the advantage which he was to obtain was by endeavoring to obtain the interview with the Admiral in the manner suggested.

Mr. Dent also says, being asked whether the suggestion for a meeting was based upon the assumption that Mesa's vessel would depart anyway, without regarding his warnings (p. 73):

> My suggestion to Mr. Mesa that he be at a certain point at a certain time was based upon the assumption that he could and would readily be there about the time specified in the natural course of carrying out his plans. The suggestion was not that Mr. Mesa should follow a certain course for his vessel, but that in the execution of his own plans he might conveniently be at that point at the time specified. * * * I will try and make myself clear. Mr. Mesa's plan was to go to Cuba and return to Jamaica, and in the course of that trip he would be in the neighborhood of a certain place at a certain time. The suggestion on my part was that, being near that certain place at that certain time, the point, being in the open ocean, must necessarily be fixed. My suggestion related only to the exact point at sea where he could conveniently be. In other words, I never made any suggestion to Mr. Mesa to make any plans whatever as a part of any agreement with me.

Mr. Dent's testimony closes with the statement that he was actuated by good faith and a desire to aid Mesa, and that any statement of Mesa, direct or by implication, that he was at any time guilty of bad faith toward him, or used any means to inveigle his vessel within the naval forces for the purpose of capture, is false (pp. 69, 73, 75).

It appears from other passages of Mr. Dent's testimony (p. 71) that his contemplation was that Mesa should meet Admiral Sampson before he attempted to go into Manzanillo, and on the other hand, on page 74, that he would meet him on his return, because Mesa would naturally be then in the neighborhood of Cape Cruz about June 30. This variation is probably explained by reason of the fact that the first proposal for the meeting was about June 20, before the *Benito Estenger* had left Kingston, when Mr. Dent would naturally think that Mesa would heed his warnings and would keep the suggested appointment before he went to Manzanillo, whereas after the vessel had left on June 23, which was the date when Dent wrote to the Admiral, he doubtless concluded that Mesa had determined to do just what he did, namely, go to Manzanillo first. Mesa probably had no intention whatever of keeping the appointment; what he desired to do was to land his cargo, and that having been effected he was proceeding as promptly as possible back to Jamaica for another cargo when he was captured near the place of rendezvous three days before the time set for it. There was, of course, no evidence whatever that Dent's letter to the Admiral was the moving cause of the capture or that the *Hornet* had been sent to lie in wait for the *Benito Estenger*, nor any evidence that the Admiral intended to avail of the suggestion made to him on Mesa's behalf.

Capt. Lucien Young, commanding the *Hist*, reports to the Rear-Admiral on July 2 (Bureau of Navigation Report, p. 227) that, arriving off Cape Cruz early on the

morning of June 30, in obedience to his orders, which related to stopping of the inside traffic west of Cape Cruz and to Manzanillo, he found the U. S. S. *Hornet*, under the command of Lieutenant Helm, cruising off the cape. That was three days after the capture, and there is nothing in the report to show that that had not been the station of the *Hornet* for some time. Certainly she was not sent there, on Dent's report, to intercept and capture the *Benito Estenger*. The letter of the Admiral dated June 25 (p. 76) speaks of a large vessel with a heavy battery at Cape Cruz, but does not say how long it had been there.

Thus the claim of an engagement with the United States, or of service to the United States, is simply baseless, and the suggestion is without relevancy and probably will not be regarded by the court as pertinent or important. If Mr. Dent's zeal had led him to step beyond his authority or to enter into an undertaking which was not justified, the United States would not be bound thereby, either in law or good morals, upon a just view of the case; but as the facts show that no engagement whatever was made, the *Benito Estenger* was captured in the ordinary course of cruising duty at a time and under circumstances when her character as prize was not to be denied. The movements of the vessel plainly showed that, the object of the trip having been accomplished, there was no intention to communicate with the Admiral, and there is no ground whatever for the claim that an agreement had been made which bound the United States to refrain from capturing the *Benito Estenger* as prize of war.

It has been determined that neither a United States consul nor the commander of an American vessel of war has authority by virtue of his official station to grant any license or permit which would have the legal effect of exempting the vessel of an enemy from capture and confiscation. (*Rogers* v. *The Amado*, Newb., 400.) And in the *Joseph* (8 Cr., 451) it was said that hostile trade is not excused by the necessity of obtaining funds to pay the expenses of a ship, nor by the opinion of an American minister, expressed to the master, that by undertaking the voyage he would violate no law of the United States.

III.

The question of the transfer of the vessel, flagrante bello, *to a neutral claimant.*

We now come to the underlying question in the case, and that is whether the asserted transfer from Mesa to Beattie was legal so as to be entitled to recognition in a prize court, or whether it was merely colorable for the purpose of evading the penalty of condemnation as enemy property.

Mesa was a Spanish subject, born in Cuba and residing at Santiago, a member of the Spanish firm of Gallego Mesa & Co., which had owned the *Benito Estenger.* It is stated that the vessel had been transferred to Mesa individually, but when and how this initial transfer had taken place does not appear. The reason for the sale given by Mesa himself and attributed to him by other witnesses is that the situation of affairs was so grave that

he was compelled to sell in order to get money for his family to live on. Nevertheless, no money passed, Mesa saying that he received a credit for a large part of the consideration on indebtedness to the claimant or the latter's firm, while the claimant himself expressly declines to say of what the payment or payments of the purchase money consisted. The price given varies, some witnesses speaking of it as £9,000 and some as $40,000, a large difference. The formal papers appear to be correct, but this is necessarily so, or the question would not be debatable. The claimant's oath under the British laws as to registration is a solemn act, but here it will be regarded only as one element in the examination of the real facts, and its intrinsic meaning will be left to the claimant's conscience. The testimony of the United States consul is clear, positive, and reiterated that the claimant admitted that he had not really purchased the vessel; that the transfer was merely for the purpose of protecting her and her owner, just as he testified positively that the final destination of the cargo was admitted by the claimant and his brother to be for the Spanish authorities.

The broker and his clerks testified formally to their belief that the sale was *bona fide*, but they evidently knew nothing of the real transaction; had heard of the price agreed on, but did not know in what shape it was paid. So as to the other witnesses, who testified as to their belief on the subject and the insignificant grounds thereof. There was no evidence beyond the doubtful assertions of Mesa and the claimant that any consideration whatever passed, and while some stress is laid upon

the scrupulous and careful character of the British registrar of shipping and collector of customs who issued the vessel's documents, his vigilance and care would not require, nor in a sense permit him to pass beyond the situation presented to him by papers regular on their face, positive in their formal statements, and substantiated by oaths to which he would naturally attach, in view of the importance and standing of the parties, and especially of the claimant and his house of trade, more than ordinary significance. There was, then, no reason apparent to him why he should not have full confidence in the statements made to him, however carefully he viewed his duties; and his general attitude toward the parties in their transaction would quite naturally, under the circumstances, be favorable.

The former Spanish master and crew remain in charge; an English subject goes on board, who appears in one portion of the evidence to have been intended as the master and in another as mate or an agent of the new asserted owner; Mesa himself goes on the voyage as supercargo. The vessel's trade remains about what it was before; or if the Jamaican part of it is a new feature, it only adds a more doubtful element, taken in connection with the well-known and repeated ventures of the same character of other similar vessels plying between Jamaica and Cuba during the Spanish war, and with the intention of Mesa to repeat the voyage. The Spanish flag is taken down from the masthead, but merely put in a locker, and with the English flag there was a port flag of Kingston and a Cuban flag. The vessel thus was apparently prepared for challenge from any source. To

recur again to the claim of Cuban sympathy (which surely means to vindicate the Cuban ownership if the English ownership fails), the Cuban flag at the masthead would have been a bold assertion of that allegiance, and no doubt would have been respected by the United States at least, although not a maritime flag recognized among the nations. But such a course was impossible, since the voyage was to a port guarded by Spanish gunboats. And the danger was the chief deterrent, although clearance from the neutral port would probably have been refused to the Cuban flag. In fact, the absurdity of Cuban sympathies on the one hand and of neutral ownership on the other are both apparent when the trade (apart from the mere color of transfer) is kept in view, namely, the carrying of provisions to a beleaguered stronghold of the Spanish forces by or under the direction of Spanish subjects established in trade in another Spanish stronghold, who still retained the Spanish flag with the vessel and whose loyalty appears never to have been seriously doubted, whatever suggestions to the contrary have been thrown into the case.

The law upon the question of such transfers partakes of the strict view which all prize law, dealing with belligerent rights, necessarily imports. Originally, any transfer *flagrante bello* was invalid. The motive of neutral protection being so obvious, the very fact of war tainted the attempt to pass the vessel from the enemy and made it void; but while in more recent times this rule has been somewhat modified, so that the fact of war does not now create a presumption *de jure* against the reality and *bona fides* of such a sale, nevertheless the

presumption, while subject to be rebutted, exists, and the case falls fully within the general doctrine that the allegation of a neutral interest is held to strict and clear proof. It has been fully determined that the *onus probandi* of a neutral interest is on the claimant. (Authorities cited *ante* and *post;* Story's Princ. and Prac., etc., pp. 26, 45, 53.) There can be no doubt that when this respects the neutral claim of property, the rule is fully effective and without exception. Some authorities intimate that where the question is one affecting the regularity of the trade or the *bona fides* of the neutral's operations—as, for instance, with respect to blockade—the prize rule disappears and the ordinary rule, by which a charge of illegality must be established by him who asserts it, takes its place. But that exception, even if it exists, does not affect the case before the Court. And so we contend that the transfer in this case is not established by such facts or in such a way as to avoid the application of the rule in prize law denying validity to transfers from an enemy to a neutral during war. Indeed, the proof would fail to show a valid transfer satisfactorily in an ordinary civil proceeding. It is only necessary to refer to the abstract of the facts stated above in order to see how fully this statement is justified. At the most, the transaction lies in mere assertion without proof, and the assertions themselves are vague and inconsistent and contradictory in more than one important respect, both as to dates and amounts; so that where prize law requires a sale of an enemy vessel to a neutral to be established as actually made for a valid and sufficient consideration and for an innocent purpose, in the sense of a purpose consistent

with good faith, and all this to appear by clear and irrefragable proof, the facts about the sale shown here, in connection with the character and movements of the vessel and the circumstances surrounding the voyage on which she was seized, bring out with irresistible force the failure of the claimant to make good his case.

As to the variations, Mesa says in his deposition *in preparatorio* that Beattie had been in possession of the vessel since the *1st day of June;* that there was a public bill of sale made on the 1st day of June in the presence of witnesses. In his test affidavit he says that on or about the *14th of June*, 1898, the sale was negotiated; while the claimant says that he first became the owner on the *9th of June*. Mesa says that he originally left Manzanillo on the 2d of June and arrived in Kingston on the 4th; while the master, Perez, says that he left on the 4th or 5th and arrived at Kingston about the 7th. And then there were the conflicting statements that the price was $40,000 or £9,000, respectively; that the sum had already been paid; and again, that part of it was credited on an indebtedness. One of the principals declines to say how it was paid, and none of the other witnesses called have any knowledge regarding the fact or circumstances of payment.

Referring now to the authorities—in the case of the *Island Belle* (26 Law Rep., 263), heard in the eastern district of Pennsylvania, there was an attempt similar to the one here to transfer title purely for purposes of protection. The court held:

> The rule of decision in some countries has been that as to a vessel, no change of ownership during

hostilities can be regarded in a prize court. In the United States, as in England, the strictness of this rule is not observed. But no change of property is recognized where the disposition and control of a vessel continued in the former agent of her former hostile proprietors; more especially when, as in this case, he is a person whose relations of residence are hostile.

Decisions of Sir William Scott are authority for this view. In *The Vigilantia* (1 Rob., 1) a ship was taken sailing under Prussian colors, and was claimed by the Crown to belong to the class in which the Dutch attempted to protect their property by pretended transfers to neutral merchants. Similar facts to those in the case at bar appear, suggesting fraud. The former owner continued to conduct the affairs of the vessel as a nominal agent; the former master continued in command; the ship continued in her former trade. "The magistrates of Embden [a neutral Prussian port] have weakened the authority of their certificates by their facility in granting them." The learned judge, referring to the certificates of identity of the Embden magistrates, which appear to have been certificates of the national residence of the master, considers that public interests require that the vigilance of such officials be more laboriously exerted against the impositions which he conceives to have been practiced upon them; because on the other supposition he should be under the necessity of expressing himself with less civility than the relation which he bears to the magistrates of other countries would induce him to do. Regarding the various papers and the conduct of the parties, the court

felt no scruple in pronouncing that the ship still continued *de facto* the property of the former Dutch owner, and was as such subject to condemnation.

> But I will go further, and for the convenience of applying a ruling principle to some other cases which, I am informed, bear a strong affinity to the circumstances of the present case, I will express my opinion on the abstract question of law. I desire to state my opinion, then, subject to the correction of a superior court, that supposing Mr. Brower to be the actual proprietor of this vessel, and resident at Embden, yet this vessel and her concerns * * * are liable to be treated and considered as Dutch property. In the first place, she is * * * a Dutch fishing vessel that went from Amsterdam regularly and habitually to Greenland and returned to Amsterdam, there to deliver her cargo. * * * She is purchased avowedly for pursuing the same course of commerce, the fishing trade of Holland. * * * I am satisfied it was the intention of the parties to carry on this trade to and from Amsterdam. Now, I ask upon what grounds is it that this vessel, so purchased and so employed, is to be considered merely as a Prussian vessel? Here is a ship as thoroughly engaged and incorporated in Dutch commerce as a ship can possibly be. She is fitted out uniformly from Amsterdam; * * * she is fitted out for Dutch importation, in all these respects employing and feeding the industry of that country; she is managed by a Dutch ship's husband, and finding occupation for the commercial knowledge and industry of the subjects of that country; she is commanded by a Dutch captain; she is manned by a Dutch crew, and brings back the produce of her voyage for the purpose of Dutch consumption and Dutch revenue. If to this you

add that the vessel is transferred by the Dutch, because they themselves are unable to carry on the trade avowedly in their own persons, it is truly a Dutch commerce in a very eminent degree, not only in its essence but for the very hostile purpose of rescuing and protecting the Dutch from the naval superiority of their British enemy. In my apprehension, unless it could be maintained as a rule, without any exception whatever, that the domicile of the proprietor constitutes the national character of the vessel, this ship must be condemned even if she had been really transferred.

Now, on that point I conceive the rule to be that where there is nothing particular or special in the conduct of the vessel itself, the national character is determined by the residence of the owner; but there may be circumstances arising from that conduct which will lead to a contrary conclusion. It is a known and established rule with respect to a vessel, that if she is navigating under the pass of a foreign country she is considered as bearing the national character of that nation under whose pass she sails; she makes a part of its navigation, and is in every respect liable to be considered as a vessel of that country. In like manner and upon similar principles, if a vessel purchased in the enemy's country is, by constant and habitual occupation, continually employed in the trade of that country, commencing with the war and evidently on account of the war, on what ground is it to be asserted that vessel is not to be deemed a ship of the country from which she is so navigating, in the same manner as if she evidently belonged to the inhabitants of it? (Pp 11–13.)

Thus the court held that even if the transfer were allowed to be good, the suspicious circumstances surrounding the vessel and her trade were valid ground of

condemnation, and on the transfer the view of the court was that it was merely ostensible and not real (p. 8):

> On the other side, suppose that there is a war, or the apprehension of a war, when the documents are composed. Here, in that decided or in that doubtful state of things, they become subject to some suspicions *in limine*, which suspicion may be increased by their having passed through the enemy's hands. The suspicions will be still further increased if the property to which they relate has continued under the management and direction of the enemy. And if, in addition to all this, they carry such contradictions or difficulties on the face of them as can not be explained, admitting the matter to be a fair transaction, all or any of these circumstances must divest the papers of their natural credit. Let us see, then, how the papers in the present case will bear this test. They are papers composed during a war, on the very spur of the occasion. They purport that a ship belonging to the enemy was at that time transferred, but it appears that the management of her concerns still continued in the hands of the former owner; * * * the Dutch master continued in command and the crew were picked up in the harbor of the enemy. In a word, there is no circumstance in the whole history of this vessel which connects her with any neutral ownership, excepting the single averment contained in them that there had been a transfer.

In that case, it is true, there was the additional element of purchase in the enemy's country. In the case at bar it was very easy to avoid that, and it was avoided. Beattie and Mesa both left Manzanillo for Kingston on June 2, Beattie on one of his own steamers and Mesa by the *Benito Estenger*.

See also *The Endraught* (1 Rob., 22, 25), in which, among other grounds of condemnation depending on the real national ownership, the court refers to a bill of sale appearing in the case which "is entirely unsupported and is only a part of the machinery of the drama."

In *The Jemmy* (4 Rob., 31), Sir William Scott says:

> This case has been admitted to further proof, owing entirely to the suppression of a circumstance which if the court had known it would not have permitted further proof to have been introduced, namely, that the ship has been left in the trade, and under the management of the former owner. Wherever that fact appears the court will hold it to be conclusive, because, from the *evidentia rei*, the strongest presumption necessarily arises that it is merely a covered and pretended transfer. The presumption is so strong that scarcely any proof can avail against it. It is a rule which the court finds itself under the absolute necessity of maintaining. If the enemy could be permitted to make a transfer of the ship and yet retain the management of it as a neutral vessel it would be impossible for the court to protect itself against frauds.

In that case "the inadequacy of the price and the chasms appearing in the correspondence are circumstances inconsistent with the probability of ownership;" so here, the variation regarding the date of sale and the price, and the failure to show how it was paid are likewise circumstances inconsistent with ownership. And the case of *The Jemmy* shows not only that the transfer of the *Benito Estenger* was invalid, but also—since Mesa's control and management of the vessel as supercargo appeared

upon the original testimony—that further proof was not properly allowed to the claimant.

In *The Omnibus* (6 Rob., 71), where the vessel was admitted to have been a British ship transferred at the beginning of the war to the father of the then master, who was also the former master, and asserted to have been again sold by him to the claimant, although she continued under the management of the former master and in the same course of trade, the language of the decision is as follows:

> The court has often had occasion to observe that where a ship, asserted to have been transferred, is continued under the former agency and in the former habits of trade, not all the swearing in the world will convince it that it is a genuine transaction.

In the case of *The Flora* (6 Rob., 360), the ship had been a Prussian vessel, transferred to an asserted Portuguese proprietor subsequent to Prussian hostilities, it appearing on further proof that she had been originally a Dutch vessel and transferred to Prussian ownership on the commencement of Dutch hostilities, continuing in the Prussian employment for some time, and then when lying at Lisbon, transferred to the asserted Portuguese proprietor under circumstances which appear to the court to falsify the whole transaction, and therefore the claim for ship and cargo was rejected, the transfer being considered wanting in *bona fides*. A note to this case shows the hesitation with which the transition was made from the earlier rule of declining to allow any transfer *flagrante bello*. It appears that in cases arising in 1806 the King's advocate intimated that although restitution had some-

times been made where an enemy's vessel had been transferred subsequent to hostilities, yet as the practice of such transfers was growing more prevalent and was liable to abuse, he would consider himself at liberty to argue the point in future cases, even where a treaty privilege might be involved; and in a case arising later the court declared in reply to an argument that this concession from the stricter rule had already been settled, that it did not consider the question to have been decided, being one of great importance and fit to be reserved for grave consideration.

In *The Caroline* (Spinks's Prize Cases, 252), Dr. Lushington restored a Prussian vessel which had assumed and carried Russian colors until the month of February, 1854, when the Crimean war was imminent, and then had adopted the Prussian flag. But while this was a circumstance of very considerable suspicion he was convinced that the property was proved to be Prussian, both on the documents which the vessel carried and because there was no doubt that she was originally Prussian and had assumed the Russian colors years before, during the war between Denmark and Prussia, and had merely continued to carry the Russian colors for three years after that war ceased, which, while it might have been a fraud upon other nations, was not under the circumstances in violation of British law. In other words, the real Prussian ownership and the original and resumed Prussian nationality fully appeared and was substantiated as existing *bona fide*.

In the *Otto and Olaf* (Spinks, 257, 262), where there was sale from Russian owners to Danish owners very

shortly after the Crimean war, the remark is made that the court "looks with great jealousy upon the sale of a vessel to a neutral subject at the commencement of the war," and it was held that that fact was a ground for further proof, which was thereupon ordered as to two alleged transfers of the vessel. The judgment in the *Soglasie* (id., 104, *et infra*) is referred to and distinguished with the conclusion that where an enemy vessel has been purchased by a neutral and continued in a lawful trade for a considerable length of time, a presumption arises in favor of the neutral which would not exist provided it had been the first voyage. Of course, that limited concession would not have been granted where the vessel, as here, was not engaged in lawful trade. The further proofs in the case of the *Otto and Olaf* related to the *bona fides* of the documents, including both the bill of sale and a certain certificate of ownership, and upon such further proof the validity of the transfer appears to have been established because the vessel was ultimately restored upon payment of the captors' expenses. (Note *b*, p. 263.)

Numerous other decisions of Dr. Lushington rest upon the same principles and upon facts like those involved in the case at bar. In *The Rapid* (Spinks' Prize Cases, 80) and in *The Christine* (id., 82) the transfers were to the master, and this was an additional, but not the only, reason why they were held not to be valid. The special objection to a transfer to a master seems to rest on the fact that his assertion of neutral citizenship is much less likely than in the case of one who bore no previous relation to the vessel. But the emphasis is equally laid by the judgment of the court upon the continuance of the

ship in the same trade and upon the failure to prove the actual payment of the consideration.

In *The Ernst Merck*, (id., 98), the sale was not to the master, but to neutrals of Mecklenburg, and the sale was shortly before the war. The decision is that the *onus* of giving complete and satisfactory proof of the sale lies on the claimant, and without it the court can not restore, even if it is not called upon to pronounce affirmatively that the transfer was fictitious or fraudulent. The language of the court is as follows (p. 100):

> This, being a sale by a merchant—now become an enemy—very shortly before the war, is a transaction requiring to be very narrowly investigated, and respecting which the court must exercise great vigilance lest the property of the enemy should be sheltered under a fictitious sale. A real *bona fide* sale is, no doubt, within the bounds of lawful commerce—of commerce lawful to the neutral; but if a neutral merchant chooses to engage for the purpose of extraordinary profit in dangerous speculations of this kind he must be bound to satisfy the court of the fairness of the transaction by the clearest evidence, complete in all legal form, and not only in legal form, but in truth and reality. If he does not produce such proof, or produces it in part only, when the *res gestæ* show that better proof might have been adduced, he must not expect restitution upon such incomplete evidence.

After pointing out certain discrepancies and deficiencies as to the evidence of the transfer, the learned judge continues:

> I now come to the payment. We all know that one of the most important matters to be established by a claimant is undoubted proof of payment.

And because of the absence of this proof, and because of the lack of clear evidence as to the transfer, which apparently might have been given, as well as upon other grounds, the vessel was condemned.

The facts in the case of *The Soglasie* (id., 104) differ widely from the present facts, because the vessel sailed from a Russian port with a cargo bound for a Scotch port, and was there seized by the customs officers. The claim was that she had been sold at Messina, Sicily, by the master, a neutral, shortly before the Crimean war, under a power of attorney from the enemy owner to a Danish merchant residing and trading in Sicily, upon which she assumed the Danish flag; that during the war the vessel was sold to him (the master) at Copenhagen under another power of attorney from the Danish owner. But, while, as will thus be perceived, the application of the principles is to very different facts, the language of the court covers the present case and may also aptly be applied thereto.

> I need hardly repeat what I have stated in previous cases—that the court can only restore when the affirmative proof is satisfactory; * * * the *onus probandi* must lie upon the claimant, who has to establish the affirmative. * * * I almost repeat the very words of Lord Stowell when I say that the court never inquires whether an individual is perjured or a document forged; the inquiry is, whether it is satisfied by the whole evidence. With regard to documents of a formal nature, though when well authenticated they are to be duly appreciated, it does not follow that they are always of the greatest weight, because we know, without attributing blame to the authorities under which they issue, they are

> instruments often procured with extraordinary facility. What the court especially desires is that testimony which bears less the appearance of formality—evidence natural to the transaction, but which often carries with it a proof of its own genuineness; the court looks for that correspondence and other evidence which naturally attends a transaction, accompanies it, or follows it, and which, when it bears upon the face of it the aspect of sincerity, will always receive its due weight. But, on the other hand, when such means of information, which might naturally be expected, are wanting, and further proof has been allowed, the court is led to suppose that that which is almost indispensable to a just case either does not exist, or if produced would be detrimental to the cause of the producent (pp. 105, 106-7).

The court points out the lack of proof of payment of the purchase price, either of the sale at Messina or of the second one at Copenhagen. The sale was also attacked by the captors because it was made *in transitu*, and that element, we contend, really exists here, because it does not strain the facts to urge that the real voyage of the *Benito Estenger* was from Manzanillo (whence she sailed June 2) back to Manzanillo. But the decision also rested on the fact that the sale was *flagrante bello*, and the authority of Sir William Scott is cited as denouncing such a transaction as illegal. The learned judge continues (p. 110):

> I am of opinion that the claimant has wholly failed to substantiate his claim by reasonable proof, and that such proof as has been produced is utterly inadequate to satisfy that demand which the practice of the court and the rules sanctioned so repeatedly by Lord Stowell justly require. I found my judgment

> in this case mainly upon the entire absence of the proof natural to this transaction; upon the absence of any letter from Mr. Saraow, from Mr. Jeff, and from Messrs. Broberg, and of any affidavit from these gentlemen; and on there not being a single atom of proof that Mr. Jeff was paid for the ship which was purported to be sold. I consider it my duty to condemn this vessel, adding, however, that even had the proof of ownership been more stringent, I am not satisfied that I could have restored the property to the master as entitled to a Danish character. No evidence having been given with respect to the cargo, that likewise must be condemned.

Just as in this case, notwithstanding the neutral claim, the real ownership comes forward in Mesa's assertion of his Cuban sympathies, so in the case of the *Soglasie*, a claim was made in argument that even if the vessel was Russian, it should be protected under the Order in Council. The reply of the court covers the equivalent suggestion in the present case (p. 110–11):

> Then I do distinctly say, if a man chooses to clothe himself fictitiously with a Danish character, and attempts to get restitution under that pretense, and the court detects the falsehood from all the evidence of the character which he pretends to assume, I think it is not very consistent with law or justice that he should then be entitled to turn round and say, "I played the rogue—I tried to persuade you I was a Dane, but I am in reality a Russian; give me the benefit of that Order in Council which I should have been entitled to if I had acted as an honest man."

See also *The Johann Christoph* (id., 60), upon such claim of exemption under the Order in Council.

In *The Baltica* (id., p. 264), several vessels were sold by an enemy father to a son who was a neutral, immediately before the war, which were only paid for in part, and they were condemned on the ground of continuance in the enemy's interest. Such transactions were held to amount to a fraud against belligerent rights, whether done in contemplation of war or *flagrante bello*. That case also decided that a neutral residing in an enemy's country, and trading there as a merchant, must be regarded as an enemy. The same circumstance in this case should have its due weight. Notwithstanding the technical nationality as British, the claimant had been for a long time a trader established in the territory of the enemy. His foreign domicile in Cuba, notwithstanding the allegations as to the domicile of his parents in England and his successive visits there, fully appears from the admitted facts of his interests and occupation in Cuba. We shall revert to this point below.

The conclusions from the foregoing and other authorities seem to be as follows: That the transfer of a vessel, not shown with entire clearness as *bona fide*, especially where the payment of the purchase price does not positively appear, is void whether made *imminente bello* or *flagrante bello*. The feature of a transfer *in transitu* adds to the suspicions against the vessel, and a transfer to the master, the vessel continuing in the same course of trade, is especially suspicious, the object in all such cases being the same, namely, to elude a belligerent right *animo fraudandi*. (*The Jan Frederick*, 5 Rob., 132.) It may well be argued in this case that the pretended sale was really effected *in transitu*, because the *Benito Estenger*,

proceeding from Manzanillo originally, merely passed over to Kingston in order to obtain the protection of a transfer and to take on there the return cargo for Manzanillo, which was, as a matter of fact when the vessel set out, its real and ultimate destination, whereby she continued substantially in the same course of trade in which she had been engaged previously. And while the case of transfer to a master, especially were there is grave doubt about his asserted neutral citizenship, is particularly suspicious, for the obvious reason that he had just previously been engaged in the commercial service of the enemy and on an enemy vessel, yet the same suspicion and for similar reasons applies to the case of the claimant here. In other words, the claimant may be a neutral, but in view of his relations and actions, his neutrality may not avail him to save his property any more than the doubtful neutrality of the master in the cases of transfer to the latter.

The claimant's subject relation to England is asserted, because, when he was born in the enemy territory at Santiago, his father was serving as British vice-consul there. Nevertheless he had been established in business in the enemy territory for years; he was clearly resident or domiciled there, whatever the claim of continuing connection with England; and the general rule is clear that under such circumstances his property is to be regarded as enemy property and as condemnable as prize. For the purpose of capture, property found in enemy's territory is enemy's property without regard to the status of the owner. (*Lamar, ex'r*, v. *Browne*, 92 U. S., 187;

The Friendschaft, 4 Wheat., 105; *The Cheshire*, 3 Wall., 231; *The William Bagaley*, 5 Wall., 377; *United States* v. *Farragut*, 22 Wall., 406.) This is true, even if the property be owned by a loyal citizen of the country of the captors. The liability of the property is irrespective of the *status domicilii*, guilt or innocence of the owner (*The Grey Jacket*, 5 Wall., 342); the only qualification of the rule being where upon the breaking out of hostilities, or as soon after as possible, the owner escapes with his property. The commercial domicile of a merchant at the time of capture of his goods determines their character as hostile or neutral. (*The Venus*, 8 Cranch, 253; *The Frances*, id., 363.) And as to partnership relations, the determinations are that the property of a commercial house established in the enemy's country is subject to seizure and condemnation as prize without regard to the domicile of the partners, even though a member of the firm resides elsewhere. While the claim here is on Mr. Beattie's individual behalf, his own residence in fact and the indication as to his brother's residence, both of them evidently being engaged in the management of the Cuban estates, make it appropriate to cite the principle ruled in the *Bagaley* case, *supra*, namely, that a firm doing business in the enemy's territory, where the active member of the firm resided, must be ruled by his status in reference to the property of the firm under his control in the enemy's country. (*The Cheshire*; *The Friendschaft*; Prize Cases, 2 Bl., *supra*; *The Antonio Johanna*, 1 Wheat., 159.)

National character depends on domicile, and the character of a ship is determined by the residence of her

owners and not by the flag she carries. (*The Ann Green*, 1 Gall., 274; *United States* v. *El Telegrafo*, Fed. Cas., 15049; *The San Jose Indiano*, 2 Gall., 268.) There are numerous authorities; see Digest Federal Cases, pp. 2379 et seq.

The rule as to merchandise appears to be that goods consigned to a neutral trader or house of trade established in the enemy territory, or goods belonging to such owners shipped out of the enemy territory in the course of trade, and not in process of withdrawal because of the war, within a reasonable time, are good prize, because of the commercial *locus* of the owners; and that if the goods are the produce of an estate situated in the hostile territory, they are so impressed with the character of the soil that, although the owner of the estate be resident in a neutral country, his interest in the produce is deemed enemy property. (Story Prin. & Pr. of Prize Courts, pp. 60, 62, 63, 70, and cas. cit.; *30 Hogsheads of Sugar* v. *Boyle*, 9 Cr., 191; *The Lilla*, 2 Spr., 177; *The Mary Clinton*, Blatchf. Pr. Cas., 556; *The San Jose Indiano*, 2 Gall., 268; *The Francis*, 1 Gall., 618; *The Evening Star*, Blatchf. Pr. Cas., 582.)

Thus the claimant's case, like the master's in the English cases referred to, is vitiated by the fact that he has been for years a part of the commercial resources and operations of the Spanish territory, has been engaged in trade there, and has thus become, with reference to prize law, subject to the condemnation of his property as *quasi*-enemy property, whether it is his own individual possession or is embraced in the possessions of his firm. And

if it is said that the cases in which these doctrines were established concerned merchandise and cargoes which were the produce of the neutral's business in the enemy's territory, or were found there or consigned to him there, and not to his vessels captured on the high seas, the fact is especially to be noted in this case that the capture was effected within the enemy's territorial waters. "The ship was captured in front of Cape Cruz." (Record, pp. 13, 16.) "The ship was about *a mile and a half* northwest of Cape Cruz light-house at the time of her capture" (p. 10). So that, granting for argument the asserted transfer, here is a case of property of a neutral, who was domiciled and established in business for years in the enemy's territory, captured in that territory, and this brings it squarely within the decisions on the subject as cited, and there is no exception therefrom which is applicable. These rules were established in cases in which the trade was shown to be innocent, or was presumably innocent, and yet the property was condemned. Here, as we insist, the trade was not legitimate; it was trade with the enemy, concealed in its real nature, ostensibly innocent and carried on by a neutral, but really conducted by the Spanish owner of the Spanish vessel with the acquiescence and participation of the neutral transferee. It was "illicit intercourse with the enemy." Thus, on all grounds, when the real character of the business and nature of the sale are examined, it is seen that the condemnation of the ship is entirely consistent with justice and equity.

The United States authorities on the question of transfer, with which the nature of the trade pursued by the vessel is often closely associated, are as follows:

In *The Rugen* (1 Wheat., 62) it was held that whatever may be the regularity and effect of the neutral muniments of the ship, yet if the court shall be of opinion that they were only colorable, they will not serve to elude belligerent rights. "So far from such documents, when intended only as a cover, affording any protection to property, they render the party resorting to them doubly criminal by the scene of fraud and perjury, which must be waded through in order to obtain them; and then in case of disaster to make a court believe that such papers disclose nothing but the real truth of the case" (p. 67).

Change of ownership during hostilities is not recognized where the disposition and control of the vessel continue in the former agent of hostile proprietors. Enemy property transferred to a neutral residing at the time in enemy country (it is to be observed that Mr. Beattie did not go to Jamaica until early in June, 1898) does not change its character as enemy property. Transfer of property to a neutral by an enemy in time of war is illegal as in violation and fraud of vested belligerent rights. (*The Island Belle*, 26 Law Rep., 263; *The Mersey*, Blatchf. Pr. Cas., 187; *The Stephen Hart*, id., 387.) In the latter case it was held that the mere registry of the vessel in the name of the neutral claimant as owner is not enough, and that competent proof of the transfer must be produced or the vessel will be regarded as enemy

property. And in the case of *United States* v. *The Lilla* (2 Cliff., 169), the decision was that the purchase of an enemy vessel in a neutral port is itself a suspicious circumstance, so that the evidence of an absolute *bona fide* transfer must be clearly established.

Justice Story's views upon the questions involved in the case are as follows:

> The questions which are most ordinarily discussed in prize courts at the hearing of the cause respect the national character of the property; and this depends sometimes upon the habits and trade of the ship, upon the nature of the voyage or of the cargo, or upon the legal or illegal conduct of the parties themselves; but ordinarily depends upon the national domicile of the asserted proprietor or upon the nature of the title which he asserts over the property. In all these cases where the property is condemned it is by fiction, or rather by intendment of law, deemed the property of enemies, that is, of persons who are so to be considered in the particular transaction, and is condemned *eo nomine*. * * * In respect to the question who are to be considered enemies or not, the general principle is that every person is to be considered as belonging to that country where he has his domicile, whatever may be his native or adopted country. * * * And even if a person goes into a belligerent country originally for temporary purposes, he will not preserve his neutral character if he remain there several years, paying taxes, etc.

In order that the native character may revert, it is necessary that the neutral so resident or domiciled shall put "himself *in itinere* to return to his native country *animo revertendi*." (Story's Notes on the Principles and

Practice of Prize Courts, pp. 58–60.) Even if the person is not resident in the enemy's country, but is a partner in a house of trade there, his goods are liable to condemnation, "for the domicile of the house is considered in this respect as the domicile of the partners." "It is a settled principle that traffic alone, independent of residence, will in some cases confer a hostile character on the individual;" and while in general the national character of ships depends on the residence of the owner, and the flag and pass are conclusive, this is not so, even if purchased by a neutral, if the vessel is engaged in the trade of the enemy's country. The solemn declarations of character and ownership may be shown to be "spurious credentials assumed for the purpose of disguising the real character of the vessel; and it is no inconsiderable part of the ordinary occupation of a prize court to pull off this mask and exhibit the vessel so disguised in her true character of an enemy's vessel." (Id., pp. 60–2.)

> In respect to the transfers of enemy's ships during war, it is certain that purchases of them by neutrals is not in general illegal; but such purchases are liable to great suspicion; and if good proof be not given of their validity by a bill of sale and payment of a reasonable consideration, it will materially impair the validity of the neutral claim; * * * and if after such transfer the ship be employed habitually in the enemy's trade, or under the management of a hostile proprietor, the sale will be deemed merely colorable and collusive. * * * Anything tending to continue the interest of the enemy in the ship vitiates a contract of this description altogether (p. 63). (Citing *The Bernon*, 1

Rob., 102; *The Sechs Geschwistern*, 4 Rob., 100; *The Jenny*, id., 31; *The Omnibus*, 6 Rob., 71; and other cases on previous pages.)

Referring to proprietory interests in cargoes and to transfers *in transitu* and the rule that national character may not be changed during a voyage undertaken when hostilities exist or are imminent, which rule Justice Story says equally applies to ships and cargoes, he remarks (pp. 64–5):

> And property is still considered *in transitu if it be ultimately destined to the hostile country, notwithstanding it has arrived at a neutral port* and the ship is there changed. The reason why courts of admiralty have established this rule as to transfers *in transitu* during a state of war or expected war is asserted to be that if such rule did not exist, all goods shipped in the enemy's country would be protected by transfers which it would be impossible to detect.

The rule applying equally to ships covers this case, where the ship was not changed for transshipment of cargo, but was changed in ownership for the same illegal purpose.

Dr. Lushington, in the case of the *Soglasie*, referred to before (Spinks Prize Cases, 104, et seq.), appears to think that while generally in prize law the *onus probandi* rests on the claimant, who has to establish the affirmative, in cases of transfer there can not be said to be any presumption on either side; that the court ought to commence its investigation with perfect impartiality and all relevant circumstances must be duly weighed; and that from those circumstances undoubtedly a presumption

may arise in favor of or against any *particular* claimant. "Weighing all these circumstances, the court relies on no conclusion from the fact of the power of attorney to the master; indeed, I ought rather to say that in almost all these cases it is not from an isolated fact but from a view of all the circumstances taken together that the court can form its judgments."

Now it seems to us that Dr. Lushington shows in this case and by such language that, while the effort should be to arrive at the truth from all the circumstances, there is of necessity in certain prize cases, and especially in cases of alleged sale, a suspicion *in limine*, because of which the *onus probandi* to show the affirmative rests with particular force in such cases upon the claimant. Else why should not a power of sale or a bill of sale make a *prima facie* case in favor of the claimant? Plainly it does not, and has not customarily in the cases in which such documents appear. (Cf. Lord Stowell's "suspicions *in limine*" in the case of the *Vigilantia, 1 Rob., 1, 8.*) But however the rule may be in this respect, we contend that the most scrupulous weighing of all the facts and examination of the real nature of the case for the sole purpose of arriving at a conclusion consistent with impartial justice will fail "to satisfy the court of the fairness of the transaction by the clearest evidence complete in all legal form, and not only in legal form, but in truth and reality." (*The Ernst Merck*, Spinks Prize Cases, 101.) While it is the duty of the courts to protect the just rights of neutrals and the proper exercise of municipal powers by independent States within their

own dominions, when the officials thereof have not been evidently deceived by false representations as to a vessel, or have not granted papers knowing that they were granted upon false grounds, nevertheless "it is also the court's bounden duty to take care that [such powers and alleged rights] do not operate as an infringement on the just rights of belligerents." (*Ibid.*, p. 103).

It is always to be borne in mind that there is a very strong indication in the record of Mr. Mesa's continuing interest in the vessel. He, as well as the master, made a test affidavit and claim on behalf of Mr. Beattie. Why should he have done so if the sale terminated his interest in the vessel? It was very obvious that any doubt of Mr. Beattie's sole interest was a dangerous suggestion to enter upon the record, because one of the requirements in prize law is that the ownership claim should be a sole one, or that the neutral interest, if claimed by more than one party, should be entire; that is, should cover all of the property; that there should not be any outstanding interest or claim which was not clear. Nevertheless, the risk of suggesting that defect was taken, and Mr. Mesa made a claim ostensibly on Mr. Beattie's behalf. But we say that it is a fair inference from all the circumstances, and a proper argument to make, as we do, that this means that Mr. Mesa is still interested, and that in his anxiety to protect his interest, he proffered to the nominal claimant's use an additional test affidavit and claim which, if the neutral ownership were genuine, was unnecessary surplusage.

If the claim is false, that is a cause of condemnation in itself, because it was determined in *The Amiable Isabella* (6 Wheat., 1) that the assertion of a false claim in whole or in part by an agent or in connivance with the real owner is a substantive cause of condemnation.

Thus, on all the circumstances presented in this case, and the principles invoked and applicable to them—the illicit trade with the constituted authorities of the enemy; the Spanish nationality of the vessel and of her real owner, who continued to direct her movements under the allowance and appointment of the pretended transferee; the illusory character of the Cuban adherence, in view of the record facts and the well-established rules regarding residence and trade in enemy's territory; the absurdity of the claim of service to the United States or of agreement with the United States consul which would confer protection upon the vessel; and, finally, the lack of reality or *bona fides* in the asserted sale and transfer, made *flagrante bello*, not measuring up to the requirements of the decisions in prize, although these are less strict than the ancient rule, which listened to no transfer *flagrante bello*—all combine to justify, and, as we contend, to require the affirmation by this Court of the decree of condemnation of the *Benito Estenger* in the prize court below.

HENRY M. HOYT,
Assistant Attorney-General.

JOS. K. MCCAMMON,
JAMES H. HAYDEN,
Of Counsel for Captors.

No. 192.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1899.

No. 192. Prize.

THE STEAMSHIP BENITO ESTENGER

vs.

THE UNITED STATES.

Further Stipulation as to the Term "Patente" in Certain Spanish Documents.

Referring to pages 2 and 3 of the Spanish documents and translation added to the record herein by stipulation dated January 22, 1900, it is further agreed—

That the Spanish word "patente" is sometimes used in commercial and maritime parlance for a marine paint for ships' bottoms, and it is stated by Mr. Messa that it was so used in these cablegrams.

This stipulation may be submitted to the justices of this court as soon as printed by the clerk.

Dated February 10, 1900.

HENRY M. HOYT,
Assistant Attorney General, for the United States.
JAMES H. HAYDEN,
Of Counsel for Captors.
HARRINGTON PUTNAM,
Advocate for Claimant.

[Endorsed:] File No., 17,268. Supreme Court U. S., October term, 1899. Term No., 192. The Steamship Benito Estenger, &c., *vs.* The United States. Stipulation as to certain Spanish documents. Filed February 12, 1900.